In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1443

KITTY LOUISE STROUSE and
ROBERT D. WINTER,
Petitioners,

VERSUS

BETTE J. WINTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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March, 1979

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Oklahoma entered on October 24, 1978; timely petition for rehearing denied January 31, 1979.

OPINION BELOW

The opinion of the Supreme Court of Oklahoma and the dissenting opinion, not yet reported, appear in the Appendices hereto.

JURISDICTION

A judgment of the Supreme Court of Oklahoma was entered on October 24, 1978. A timely petition for rehearing was denied on January 31, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether, consistently with the Fourteenth Amendment of the Constitution of the United States, one may be deprived of her property interest in a promise made by the promisor with the undisclosed intent not to perform that promise.

2. Whether, consistently with the Fourteenth Amendment of the Constitution of the United States, one may be deprived of her liberty to enter into a promissory agreement made by the promisor with the undisclosed intent not to perform that promise.

3. Whether, consistently with the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, one may be deprived of the right to set aside a consent to the adoption of her child, procured by the fraudulent undisclosed intent of the adoptive parent not to honor a promise to have the adoption set aside on certain conditions, by an amendment to the general statute of limitations governing actions on fraudulent promises, which amendment does away with the right to recover on the fraudulent promise to have the adoption set aside, while leaving unmodified the long established statutory right of all other persons to recover for the breach of fraudulent promises within the time fixed by the general statute of limitations.

4. Whether, consistently with the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States, the State of Oklahoma may place a prohibition to challenge "on any ground either by

a direct or collateral attack more than one (1) year after the entry of the final adoption decree regardless of whether the decree is void or voidable," as is done by 10 Okla. Stat. (1971 Supp.) §58 (Appendix F), while permitting attacks upon other decrees obtained by fraud, regardless of whether the effect is that they are void or voidable, by statutes of limitations permitting such challenges within two years after discovery of the fraud, see 12 Okla. Stat. (1971) §95(fifth) (Appendix F), or without limit by 12 Okla. Stat. (1971) §1038 (Appendix F).

STATUTORY PROVISIONS INVOLVED

10 Okla. Stat. (1971) §58.

12 Okla. Stat. (1961) §95 (sixth).

12 Okla. Stat. (1971) §95 (third).

12 Okla. Stat. (1971) §95 (sixth).

Okla. Sess. Laws, 1971, Ch. 316, §3, omitting and thereby repealing 12 Okla. Stat. (1971) §95 (sixth).

12 Okla. Stat. (1971) §1038.

STATEMENT OF THE CASE

A dispute arose between the petitioner, Kitty Louise Strouse, and her mother, the respondent, concerning the right to have set aside the adoption by the respondent of Mrs. Strouse's daughter, Lori Gay Winter, then eight (8) years of age. Lori had been born out of wedlock when the then Miss Kitty Louise Winter was seventeen (17) years of age. After considerable pressure, including representations by respondent, Bette J. Winter, of the advantages which would accrue from the adoption of Lori by

respondent and her husband, Robert, the petitioner, Kitty Louise Winter (as she then was) agreed upon the promise of Bette and Robert Winter that, if and when Kitty married a man of whom they approved, they would have the adoption set aside, and would relinquish custody of Lori to Kitty and her husband. Kitty did marry Robert Strouse, her present husband. The Winters approved of him, and the Strouses repeatedly stated that they wished to have Lori with them. However, respondent, Bette J. Winter, repeatedly advanced plausible reasons why the time was not propitious for such a change from the standpoint of the Strouses, or of Lori, or of both. Finally, when the issue no longer could be evaded, the respondent, Bette J. Winter, flatfootedly refused to keep her promise, and stated that, from its inception she had not intended to keep it. (The respondent, Bette J. Winter, denies this, but the Oklahoma courts, at both trial and appellate levels, have accepted the Strouse version.) Accordingly, on March 22, 1976, the petitioner, Kitty Louise Strouse, commenced this action in the District Court of Pottawatomie County, Oklahoma, to set aside the adoption and to secure custody of Lori. After hearing evidence and receiving exhibits, the trial court found the issues of fact in favor of the plaintiff, and awarded the custody of Lori to Kitty Louise Strouse and her husband, with permission to take her to Minnesota, where Sergeant Strouse, who was making a career with the Air Force, was stationed. Robert Winter, by now divorced from Bette J. Winter, joined the Strouses in requesting that the promise made by Bette J. Winter and by him be enforced.

Bette J. Winter appealed the judgment of the District Court of Pottawatomie County to the Supreme Court of Oklahoma. That court, by a bare majority of five justices to four, reversed the decision of the trial court, and directed that the Strouses restore Lori to the care of her grandmother. The net result will be to place Lori in the sole custody of Bette J. Winter, and to deprive her of the comfort and care of a father; and, as well, to subject her to the pressures of a grandmother who is bitterly estranged from her mother and will endeavor to alienate Lori's affections from her. The adverse psychological effect upon Lori will be tremendous. It could destroy her chances for a well adjusted life.

REASONS FOR GRANTING THE WRIT

The effect of the decision appealed from is not confined to the immediate parties nor to the State of Oklahoma. All over the country, children are born out of wedlock by mothers of slight ability to support them. Arrangements and adjustments for their care are entered into and promises are made. It is of importance that these promises be not interfered with by invidious state legislation. As this Court said in *Stanley* v. *Illinois*, 465 U.S. 645, 680 (1972):

> "The rights . . . to raise one's children have been deemed essential, basic civil rights of man and rights far more precious than property rights."

This Court has said, in *Baltimore & Ohio S.W.R.R.* v. *Voight*, 176 U.S. 498:

> ". . . it must not be forgotten that the right of private contract is no small part of the *liberty* of the citizen, . . ." (emphasis supplied)

This expresses the constitutional protection that should be accorded petitioner, Kitty Louise Strouse's reliance upon the promise made by Bette J. Winter. Along the same line is the statement:

> "It has been held that the right to make contracts is embraced in the conception of liberty, as guaranteed by the Constitution."

The net effect of the decision of the Supreme Court of Oklahoma, set out as Appendix A to this petition, is that the court has applied 10 Okla. Stat. (1971) §58 (Appendix F) to bar petitioner, Kitty Louise Strouse, from avoiding an adoption procured by fraud, contrary to the provisions of 12 Okla. Stat. (1971) §95(third) (Appendix F) and (sixth) (Appendix F), excepting from a one-year limitation on proceedings to vacate an adoption decree, those decrees obtained by extrensic fraud. The decision also denied to her the provisions of 12 Okla. Stat. (1971) §1038 (Appendix F) permitting an action to vacate a judgment on grounds of fraud to be commenced within two years after entry of the judgment. Thereby, the Oklahoma statutes, as construed and applied, have deprived Mrs. Strouse of her liberty and her property right to have false promises, relied upon in good faith, enforced. She has also been deprived of the equal protection of the laws, since all other persons are entitled to two years to enforce these false promises, and only Mrs. Strouse and other persons relying upon false promises used to secure assent to adoption, are remitted to one year — a ground of distinction which presents no difference.

The Oklahoma Supreme Court rested its decision entirely upon statutory grounds, since it did not overturn

the trial court's decision (Appendix A), though referring in a footnote to the opinion (Appendix A), at page 5, to a single decision, *Birmingham Fire Insurance Company* v. *Bond*, 301 P.2d 361 (Okla. 1956), that:

> ". . . where the record clearly shows that the question of constitutionality of an Act of the Legislature was not presented to the trial court, and no reference to the constitutionality of the Act . . . appears in the record, such question will not be considered on appeal by this court."

It is clear that the reference in question was not made the ground of decision, since the opinion makes no statement showing the applicability of the referenced case, and the ensuing presentation of the ratio decidendi of the decision is confined to which statute of limitations shall be applied. The court was correct in not even suggesting that the *Birmingham Fire Insurance Company* v. *Bond*, 301 P.2d 361 (Okla. 1956) decision was authoritative, since the question of constitutionality did not enter into this case until the Supreme Court of Oklahoma announced its decision. The trial court (Appendix E) simply discusses the issues of fraud and of the applicable limitations, so there was no occasion to present there an issue of constitutionality and, since the appeal of Mrs. Winter to the Supreme Court of Oklahoma was directed to fraud and to the statute of limitations, it was not until the decision was announced and the effect thereof was made to appear. Up to that point, there was no occasion for it to "appear in the record." When that occasion occurred, the petitioners promptly raised the question, and cited a prior decision of the Supreme Court to show that this was proper: *First National*

Bank v. *Southland Production Co.*, 112 P.2d 1087 (Okla.). The decision of the Supreme Court of Oklahoma, therefore, does not rest upon any supported local rule of practice.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and judgment of the Supreme Court of Oklahoma.

Respectfully submitted,

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March, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of March, 1979, three copies of the petition for writ of certiorari were mailed, postage prepaid, to Albert W. Murry, 3801 Classen, Suite 200, Oklahoma City, Oklahoma 73118, and to Arthur L. Dyer. Jr., 3801 Classen, Suite 200, Oklahoma City, Oklahoma 73118, attorneys for the respondent.

I further certify that all parties required to be served have been served.

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN THE MATTER OF THE ADOPTION)
)
OF LORI GAY W.)
BETTE J. W.,)
Appellant,)
-vs-)
) No. 49,807
KITTY LOUISE S. AND ROBERT)
D. W.,)
Appellees.)

* * *

APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY, OKLAHOMA
Honorable Glenn Dale Carter, Trial Judge

* * *

Appellant, an adoptive parent, appeals from an order of the trial court vacating a decree of adoption on the grounds that the natural mother's consent to the adoption was procured by fraud.

* * *

REVERSED AND REMANDED

* * *

Albert W. Murry,
Arthur L. Dyer, Jr.,
Oklahoma City, Oklahoma, For Appellant,

Paul McKinney
Joseph E. McKinney,
Shawnee, Oklahoma, For Appellees.

IRWIN, J.

Appellee (Kitty) is the daughter of appellant (Bette) and appellee (Robert). Kitty is the natural mother of a minor girl (Lori) who was adopted by Bette and Robert. The decree of adoption was entered on February 28, 1972. On March 22, 1976, Kitty commenced proceedings to vacate the adoption decree based upon fraud. Kitty admits she discovered the alleged fraud in July, 1974.

The primary issue presented is whether the one (1) year or two (2) year period of limitations was applicable. The trial court determined that the two year period was applicable and rendered judgment vacating the adoption decree based upon a finding that Kitty's action was brought within two years of the discovery of the fraud. Bette appealed. Robert, since divorced from Bette, did not challenge the proceedings to set aside.

Kitty was seventeen years old when Lori was born out of wedlock in July, 1968. Kitty and Lori lived with Bette and Robert for approximately two and one half years following Lori's birth and during that time Bette and Robert exerted considerable pressure upon Kitty to allow them to adopt Lori. Kitty eventually consented so that Lori would have a complete birth certificate, medical and health insurance, and the advantages of a two parent home. Additionally Bette promised that Kitty's parental rights would be restored when Kitty married a man acceptable to Bette and Robert. Kitty consented to the adoption of Lori in November, 1971, with all the necessary court formalities.

After the petition for adoption was filed and before the final decree was entered in February, 1972, Kitty married a husband of whom Bette and Robert approved. Kitty testified she asked for return of Lori right after her marriage and before the final decree of adoption was entered. She further testified for 2 and ½ years after the decree

of adoption was entered her efforts to regain Lori were thwarted by one excuse after another and that Bette would always tell her to wait for a better time. Finally in July 1974, Bette told Kitty that she would never relinquish Lori, and had never intended to do so. This, claims Kitty, is the first time she knew of Bette's fraudulent intention and conduct to keep the child.

The gist of Kitty's petition to vacate the adoption decree was that her consent to adoption was obtained by reason of the fraudulent conduct of Bette and that Bette continued her fraudulent conduct in that she kept promising her that the adoption would be vacated and her parental rights restored as soon as Kitty could properly care for Lori.

Bette contends that the one year limitation period prescribed by 10 O.S. 1971, §58, is applicable and it effectively bars Kitty's action to set aside the adoption decree. Sec. 58, which was enacted in 1971, provides:

> "No adoption may be challenged on any ground either by a direct or collateral attack more than one (1) year after the entry of the final adoption decree regardless of whether the decree is void or voidable and the minority of the natural parent shall not operate to prevent this time limit from running."

Kitty relies upon 12 O.S. 1971, §95 (third) which provides a two year limitation for "An action for relief on the ground of fraud — the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." Kitty argues that since she did not discover until July 1974, that Bette did not intend and had never intended to let her have Lori, that her action to vacate the adoption decree based upon fraud was timely commenced within the 2 year limitation period.

Prior to the enactment of 10 O.S. 1971, §58, and the amendment of 12 O.S. 1961, §95 in 1971 (See 1971 Session

Laws, Ch. 316, Pgs 800-802) limitations for proceedings to vacate or set aside decrees of adoption were governed by 12 O.S. 1961, §95(sixth) which provided:

> "An action or proceeding which seeks to vacate, cancel or otherwise attack or to avoid a decree of adoption, directly or collaterally, except in the case of extrinsic fraud shall be brought within one (1) year from the date of the entry of decree; * * *"

The above limitations proviso was deleted by the 1971 amendment to sec. 95, supra, in the same legislative enactment in which sec. 58, supra, was enacted.

Kitty cites *In Re Adoption of Graves,* Okl., 481 P.2d 136 (1971); and *In the Matter of the Adoption of Jones,* Okl.App., 558 P.2d 422 (1976), as holding that our former statute (sec. 95 [sixth]), repealed in 1971, which granted natural parents the right to set aside an adoption decree obtained by fraud, was purely a declaration of the common law. Kitty argues that "fraud remains grounds for revoking a decree of adoption; that the repeal of title 12 O.S. 1961, §95 (sixth), did not remove fraud as grounds for withdrawal of consent, or revocation, nor did the passage of title 10 O.S. 1971, §58 strike down the common law rights of the natural parent to bring an action to set aside a decree of adoption within the period of time prescribed in 12 O.S. 1971, §95 (third), two years on grounds of fraud."

When 12 O.S. 1971, §95, is considered in connection with 12 O.S. 1971, Chapter 16, relating to "Vacation and Modification of Judgments by Trial Court" and in particular 12 O.S. 1971, §1031 and 1038, it is apparent that 12 O.S. 1971, §95 (third) is not applicable in these proceedings or in any other proceedings which are commenced to vacate or set aside a judgment based upon fraud. Sec. 95, supra, relates to limitations of civil actions other than for the recovery of real property, and, generally speaking, relates to an initial action where a litigant seeks to obtain

a judgment. After the deletion of the limitation period for attacking adoption proceedings in 1971, sec. 95, contains no language relating to vacating or otherwise challenging judgments that have already been entered.

On the other hand a proceeding to vacate a final decree of adoption is within the purview of 12 O.S. 1971, §1031 (fourth) which specifically provides for the vacation or modification of judgments or orders "for fraud practiced by the successful party in obtaining the judgment or order." Although 10 O.S. 1971, §58, since its enactment in 1971, is the only limitation statute specifically mentioning adoption decrees, sec. 58 makes no attempt to set forth any grounds upon which a decree of adoption may be challenged or attacked. Sec. 58 is a statute of limitation. Fraud, under sec. 1031 (fourth) remains a viable statutory ground for vacating an adoption decree.

12 O.S. 1971, §1038 is a general statute of limitation applicable to proceedings brought under sec. 1031, supra. It provides that proceedings to vacate or modify judgments or orders based upon fraud "must be commenced within two years after the judgment or order made, * * *.' And, where it is alleged that a judgment was procured by fraud, it may be attacked within two years from the date such fraud was discovered or should have been discovered by the exercise of reasonable diligence. *Westbrcok* v. *Dierks,* Okl., 292 P.2d 172 (1955). It necessarily follows that the applicable statute of limitations in these proceedings is either 10 O.S. 1971, §58, or 12 O.S. 1971, §1038, and not 12 O.S. 1971, §95 (third). This holding does not alter the primary issue presented, i.e., is the one year limitations of 10 O.S. 1971, §58, controlling in vacating or setting aside an adoption decree based upon fraud?

10 OS.. 1971, §58 states in sweeping terms that "no adoption", whether the subject of a "direct or collateral attack" may be challenged more than one (1) year after the entry of the final decree whether the "decree is void

or voidable". By repealing 12 O.S. 1961, §95 (sixth) and enacting 10 O.S. 1971, §58, in the same enactment in 1971, it is evident the Legislature intended to bar, within *constitutional limitations*,[1] any proceedings attacking a final adoption decree more than one (1) year after the decree is entered. We used the words "within constitutional limitations" because it is elementary that sec. 58, is subject to the constitutional limitations of the United States and Oklahoma Constitutions and must not be interpreted so as to bar proceedings beyond one year period where the question of due process of law is timely presented even though more than one year has expired after the adoption decree was entered. The Supreme Court of the United States in *Armstrong* v. *Manzo*, 380 U.S. 545, 14 L.Ed.2d 62, 85 S.Ct. 1187, in considering the basic requirements concerning due process in an adoption proceeding reversed and remanded to a Texas court an adoption proceeding on the grounds that the failure to notify the divorced father of the pendency of the proceedings deprived him of due process of law and rendered the decree constitutionally invalid. The Supreme Court of Colorado in *White* v. *David*, Colo., 428 P.2d 909 (1967), interpreted its limitations statutes for challenging adoption decrees in some what the same way we interpreted sec. 58, in order to uphold its constitutionality. The Colorado court said: "This statute * * * clearly serves the beneficial purpose of curing such defects which are technical and do not affect the basic rights of the parties. The statute further serves the purpose of guaranteeing to adopting parents the undisturbed relationship with the child, which was one of the legislative intents."

[1] Neither in the trial court nor on appeal have appellees challenged the constitutionality of §58, supra, under the State or Federal Constitutions. Where the record clearly shows that the question of the constitutionality of an act of the Legislature was not presented to the trial court, and no reference to the constitutionality of the act of the Legislature in question appears in the record, such question will not be considered on appeal by this Court. *Birmingham Fire Insurance Company* v. *Bond*, Okl., 301 P.2d 361 (1956).

After the 1971 amendment of 12 O.S. 1961, §95, the only statute specifically prescribing a limitation period for challenging adoption decrees is 10 O.S. 1971, §58, which is part of our adoption statutes. If the one year period of limitations prescribed by sec. 58, is not applicable to proceedings to vacate an adoption decree based upon fraud, it necessarily follows that the two year period prescribed by sec. 1038 is controlling. A fortiori, if sec. 1038 is controlling in proceedings based upon fraud, the two year period would also be controlling in a proceeding to vacate an adoption decree under 12 O.S. 1971, §1031 (seventh). "For unavoidable casualty or misfortune, preventing the party from prosecuting or defending." The Legislature, when it repealed 12 O.S. 1961, §95 (sixth) and enacted 10 O.S. 1971, §58, in the same enactment, did not intend to enlarge the time for challenging final adoption decrees but intended to shorten the time. In *Reubin* v. *Thompson*, Okl., 406 P.2d 263 (1965), we said:

> "A statute which is enacted for the primary purpose of dealing with a particular subject, and which prescribes the terms and conditions of that particular subject matter, prevails over a general statute which does not refer to the particular subject matter, but does contain language which might be broad enough to cover the subject matter if the special statute was not in existence.
>
> Where there are two provisions of the statutes, one of which is special and particular and clearly includes the matter in controversy, and where the special statute covering the subject prescribes different rules and procedure from those in the general statute, it will be held that the special statute applies to the subject matter, and that the general statute does not apply."

We hold that the specific statute on limitations for vacating an adoption decree, 10 O.S. 1971, sec. 58, controls over the general statute, 12 O.S. 1971, sec. 1038.

When the adoption decree was entered the trial court had jurisdiction of the parties and the subject matter, and the power to enter the decree. The decree was in no sense void, but merely voidable. Under sec. 58, supra, it would not be subject to attack more than one (1) year after its entry which was in February, 1972, unless some factual circumstance or legal impediment prevented the limitations from running.

As positive as the language of §58, supra, may be, we recognize an exception to its operation which is well illustrated by the present case. There is a general rule, well accepted in this jurisdiction, relating to statutes of limitations which states that if a person induces another to let the limitations period expire, and if such inducement is of such a character as to make it iniquitous to permit the limitations statute to act as a bar, the defendant will be estopped to assert the statute. *Bowman* v. *Oklahoma Natural Gas Company,* Okl.. 385 P.2d 440 (1963); *Douglas* v. *Douglas,* 199 Okl. 519, 188 P.2d 221 (1947). The *Douglas* case, for example, involved a confidential relationship existing between a father and son wherein the son exerted his influence over the father to secure his forebearance in seeking recovery on a note and mortgage on which the son was indebted. In *Douglas,* supra, the Court said:

> "* * * In order to estop a person from pleading the statute of limitations it is not necessary for such person to agree not to urge it, but it is sufficient if his conduct or promises are such as are naturally calculated to and do induce plaintiff into a belief that his claim would be adjusted if he did not sue."

The Delaware Supreme Court in *Lieberman* v. *First National Bank,* Del., 45 A. 901, in considering whether the fraudulent concealment of the existence of a cause of action would hinder the operation of the statute of limitations until discovery said:

> "* * * if one by fraud conceals the fact of a right of action, it is not ingrafting an exception on the statute to say that he is not protected thereby, but it is simply saying that he never was within the statute since its protection was never designed for such as he. By fraud, he has put himself outside of its pale. Whether this be taken as an exception, or only a limitation of the statute, it rests upon sound reason and just policy."

In the case at bar Kitty admits that in July, 1974, Bette told her that she would not release Lori and the trial court concluded that Kitty "was not aware and could not have become aware, through the exercise of due diligence, of the fraud practiced upon her until July, 1974." We conclude that Kitty became aware of Bette's fraudulent conduct in July, 1974. It would be iniquitous to permit the statute of limitations to run in favor of Bette prior to July, 1974, because 10 O.S. 1971, §58, was not designed to protect such fraudulent conduct. However, the one-year limitations period prescribed by sec. 58, did commence to run in July, 1974, and Kitty failed to commence her proceedings to vacate within one year thereafter. At the time Kitty ccmmenced the vacation proceedings in March, 1976, such proceedings were barred by the one-year limitations prescribed by 10 O.S. 1971, §58. The trial court erroneously held that a two year limitations period is applicable in proceedings to vacate a final adoption decree based upon fraud.

Judgment for costs granted appellant.

REVERSED AND REMANDED.

HODGES, C.J., LAVENDER, V.C.J., BERRY, HARGRAVE, JJ. concur.

WILLIAMS, BARNES, SIMMS, DOOLIN, JJ. dissent.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN THE MATTER OF THE ADOPTION OF LORI GAY W.	)	
BETTE J. W., Appellant,	)	No. 49,807
v.	)	
KITTY LOUISE S. and ROBERT D. W., Appellees.	)	

DOOLIN, J., DISSENTING:

The United States Supreme Court in *Stanley* v. *Illinois* 465 U.S. 645, 650, 31 L.Ed.2d 551, 558, 92 S.Ct. 1208, 1212 (1972) stated: "The rights to conceive and to raise one's children have been deemed essential, basic civil rights of man and rights far more precious than property rights." 10 O.S. 1971 § 58 should not be used to support a policy that flies in the face of this positive mandate,

In this case the trial court, who took Kitty's appearance and consent to adoption, specifically found the evidence was clear and convincing that the adoption was procured through fraud, deceit and misrepresentation, and without the jurisdictional prerequisite of a valid consent. The court also found the best interests of Lori would be served by returning her to Kitty and her husband. It concluded the common law remedy predicated on fraud sur-

vived the enactment of § 58 which should be limited to void and voidable decrees *other than those obtained through fraud.*

The decision of the trial court is in line with the reasoning of this court expressed in *In re Adoption of Graves,* 481 P.2d 136 (Okla. 1971) and *Adoption of Robin* 571 P.2d 850 (Okla. 1977), where we held adoption statutes must be strictly construed in favor of the rights of natural parents and that the welfare of the child is not to be ignored. In the *Graves* case the natural mother was attempting to withdraw her consent to the adoption of her child on the grounds it was procured by fraud. This court permitted the consent to be withdrawn in the face of 10 O.S. 1961 § 60.10 which reads, "The entry of the interlocutory or final decree of adoption renders any consent irrevocable." We held 12 O.S. 1961 § 95(6), then in force, gave a trial court jurisdiction to allow consent to be withdrawn on the basis of fraud even after the final decree had been issued. Although 12 O.S. 1961 §95, subd. 6, was repealed in 1971, eliminating the specific statute of limitations for vacation of an adoption decree on grounds other than extrinsic fraud, the *common law action for fraud should be available to natural parents for setting aside an adoption after entry of a final decree.* Similarly § 58, like § 60.10, must not be considered to have limited this remedy.

A statute should be given a sensible construction, bearing in mind the evils intended to be avoided.[1] The primary object of statutory construction is to ascertain legislative intent.[2] The obvious intent of the Oklahoma Legislature in adopting the one year limitation of § 58 was to protect innocent adoptive parents. As recognized by the majority, this section certainly serves the purpose of curing technical defects that do not affect the basic rights of the parties

[1] A.M.F. Tubescope Co. v. Hatchel, 547 P.2d 374 (Okla. 1976).

[2] Midwest City v. Harris, 561 P.2d 1357 (Okla. 1977).

and guaranties to adopting parents an undisturbed relationship. It is a desirable piece of legislation designed to assure adoptive parents that an unknown natural parent cannot come forward to "change his mind". It was not designed with the intent to protect adoptive parents who act out a clear course of fraudulent behavior in intimidation and coercion and outright lies such as practiced by Bette in this case.

Here we are not concerned with the rights of "innocent" adoptive parents. Bette is not a blameless third person who, in good faith and with honesty, adopted a child. Bette not only defrauded her daughter Kitty, she lied and misled the trial court as to the basis of Kitty's consent to the adoption. Because of the fraud she perpetrated, there are no public policy considerations which favor allowing this adoption to stand.[3] There is no circumstance which necessitates Bette's protection under the one year limitation of § 58. To the contrary, public policy would dictate that such grace period be extended if the decree is granted on the basis of fraudulently obtained consent. Where fraud exists, that would authorize a court to vacate an order, and when such fraud is discovered at a time when statutory remedies are unavailable, relief may be had in equity. *Red Eagle* v. *Cannon* 198 Okla. 330, 177 P.2d 841 (1947).

No legal scheme is completely satisfactory in handling revocation of consent to adoption. Therefore it is essential the court apply its discretion wisely and well. Unless a mother has consented freely and understandingly, the court should not separate the child from its natural parent.[4] The trial court acted in its wisdom and within its power in setting aside Lori's adoption.

[3] Adoption of Robin 571 P.2d 850, 857 (Okla. 1977).

[4] See generally "Revocation of Parental Consent in Adoption Proceedings: Recent Developments" 8 Columbia Journal of Law and Social Problems 156, 178 (1972).

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.[5] Society does not permit forfeiture of real estate, automobile, contract rights or other property if fraud is involved. Section 58 as applied by the majority transgresses the purpose of its enaction. That purpose is protection of the blameless. It is immaterial whether or not Kitty participated in the deception. Fraud was practiced *on the court* to the detriment of Lori. The trial court found her best interests were served by her return to Kitty. Lori is certainly blameless. Her welfare must not be ignored.[6]

Section 58 as applied by the majority denies a child or his parent a hearing upon the question of whether the child was fraudulently taken from her mother. Proper construction of adoption statutes is such as will promote the welfare of the child.[7] The trial court's interpretation does this. The majority's does not.

12 O.S. 1971 § 1038 allows an action to vacate an order on grounds of fraud to be commenced within two years after the judgment is rendered. Under this statute Kitty's action was timely filed. This limitation should control, not § 58.

I therefore dissent.

I am authorized to state that Justice Williams, Justice Barnes and Justice Simms concur in the views herein expressed.

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[5] Skinner v. Oklahoma 316 U.S. 535, 62 S.Ct. 1110, 86 O.Ed. 1653 (1942).

[6] In re Adoption of Graves, 481 P.2d 136 (Okla. 1971).

[7] See Nevelos v. Railston 335 P.2d 573 (N.Mex. 1959).

APPENDIX C

FILED
SUPREME COURT
STATE OF OKLAHOMA
JAN 31 1979
ROSS N. LILLARD, JR.
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Wednesday, January 31, 1979

THE CLERK IS DIRECTED TO ISSUE
THE FOLLOWING ORDERS:

49,807 In The Matter of the Adoption of Lori Gay W.
Rehearing denied.

* * * * * * *

s/ Robert E. Lavender
Chief Justice

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN THE MATTER OF THE ADOPTION OF LORI GAY WINTER.	)	
BETTE J. WINTER, Appellant,	)	No. 49,807
vs.	)	
KITTY LOUISE STROUSE and ROBERT D. WINTER, *Appellees.*	)	

ORDER

Application to recall mandate and to further stay, with alternative relief, filed February 26, 1979 by appellees, is denied.

Motion for oral argument is denied.

Mandate issued February 1, 1979 remains in effect. Similar stay relief has heretofore been sought by appellees and denied. Other filings in this Court relative thereto may not be cognizable. See Supreme Court Rule 29.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 5th DAY OF MARCH, 1979.

s/ Robert E. Lavender
Chief Justice

Lavender, C.J., Irwin, V.C.J., Barnes, J., Hargrave, J., Opala, J. — concurring

Williams, J., Hodges, J., Simms, J., Doolin, J. — dissenting

APPENDIX E

FILED
JUN - 4 1976
IN DISTRICT COURT OF
POTTAWATOMIE COUNTY
RUBY POE, CLERK
By *Billie Moody*, Deputy

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT SITTING WITHIN AND FOR POTTAWATOMIE COUNTY, OKLAHOMA

JUVENILE AND FAMILY RELATIONS DIVISION

IN THE MATTER OF THE	)	
ADOPTION OF	)	No. JFA-71-29
LORI GAY WINTER	)	

RULING

The Petitioner, the natural mother of the captioned child, filed a petition to set aside a decree of adoption alleging that her purported consent was procured by fraud, duress, intimidation and coercion. The child was born on the 22nd day of July, 1968, to the unwed 17-year-old daughter of the adoptive parents. Petitioner's evidence tends to establish that after two and one half years of endeavoring unsuccessfully to prevail upon her to consent to the adoption of her child, the adoptive parents represented to her that at such time as she had married a man of whom they approved, they would return custody of, and relinquish their rights to the child to the natural mother and her suitable husband. The Respondent Adoptive Mother denies any such representation and further alleges that the one year Statute for contesting the adoption (10 O.S. 58) precludes Petitioner from obtaining relief. The Oklahoma court has adjudicated that an adoption decree obtained by fraud or undue influence could be set aside. *Laffon* vs. *Hayden*, 337 P2d 736 (1959).

The Court determined in *Graves* vs. *Graves* 481 P2d 136 (1971) that the enactment of the Uniform Adoption

Act did not completely rule ". . . out fraud in procuring consent to an adoption . . ." and that the provisions of 12 O.S. 95 Subd. Sixth which provides ". . . an action or proceeding which seeks to vacate, cancel or otherwise attack or to avoid a decree of adoption, directly or collaterally, except in the case of extrinsic fraud shall be brought within one (1) year from the date of entry of decree . . ." survived the enactment of the Uniform Adoption Act. Subsequent to the *Graves* case the legislature repealed the foregoing 95 O.S. 12 Subd. Sixth. The legislature did not, however, repeal nor otherwise exclude application to adoption proceedings of 12 O.S. 95 Subd. Third which provides a two (2) year statute of limitation for an action for relief on the ground of fraud. The Court concludes that the repeal of Subd. Sixth, which by its very language, did not obtain in proceedings seeking to vacate, cancel or otherwise attack or void a decree of adoption predicated on extensive fraud, did not preclude attacks predicated on fraud provided for in Subd. Third which had, prior to the repeal of Subd. Sixth, been recognized in *Laffoon* vs. *Hayden* supra. The legislature enacted 10 O.S. 1103(c) in 1968 limiting to three months direct and collateral attacks on the termination of parental rights in instances where an adoption had been accomplished regardless of whether the order was void or voidable. It should be noted that the instant cause involves a purported consent to adoption and not termination of parental rights by the Juvenile Court. The legislature, after *Graves* vs. *Graves*, supra, passed 10 O.S. 58 limiting direct and collateral attacks upon an adoption to one year after the entry of a final decree regardless of whether the decree is void or voidable, in 1971. This act became effective the same day that the repeal of 12 O.S. 95 Subd. Sixth became effective. In *Graves* vs. *Graves* supra, the court discussed at page 138(3) that there was a common law right to all persons to have the revocation of an adoption decree in instances of fraud. The court held that "to strike down a valuable right existing by common

law, merely upon an inference to be drawn from a new statute, presents an unhappy manner of adjudicating those rights and holding that they no longer exist." Citing a line of authority, the Court approved the rule "that . . . statutes in derogation of common law rights are to be strictly construed . . .". This court, therefore, concludes that the common law remedy predicated on fraud has survived the adoption of 10 O.S. 58 (and although not before the court, likewise, 10 O.S. 1103(c)) and further, that application of the above sections are limited to void and voidable decrees and orders other than those obtained through fraud.

The court, having concluded that the fundamental and basic common law remedy of fraud continues to be a viable basis for seeking relief, now considers what constitutes fraud in an adoption context.

Fraud as applied in adoption proceedings has been accorded an expanded definition from common law contract and tort application. In *Arnold* vs. *Howell* 219 P2d 854 (1950), a California case, the court at page 859(11) cited with approval a statement from an earlier California case, *Wells* vs. *Zenz* 256 Pac 484 the following rule: "No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling and unfair ways by which another is decieved . . ." A comprehensive definition of common law fraud is found in the Oklahoma case of *Armstrong* vs. *Wasson* 220 Pac 643 which is cited with approval in *Arnold* vs. *Howell* supra. The allegations in *Arnold* vs. *Howell* were that the ". . . consent was obtained through the representation of the adopters and the maternal grandmother acting for them, that the adoption was necessary to protect the child and was only a temporary measure, the child to be returned to him after his overseas service. The latter representation was made without intent to carry it out."

In *Graves* vs. *Graves* supra, also an instance of grandparents adopting the child, as herein, the Court has utilized the definition of fraud from *Hildebrand* v. *Harrison* 361 P2d 498 and in doing so, the Court said: "There is also the matter of the detestable nature of 'fraud' in that it embraces all of the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another."

In Re Adoption of Hoffman 338 N.E.2d 862 (1975) at page 867 the Court provided the following definition of fraud: "As a general proposition, 'Fraud includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence * * *.' (*People ex rel. Chicago Bar Asscciation* v. *Gilmore* (1931), 345 Ill. 28, 46; 177 N.E. 710, 717.) "The concept of fraud 'implies a wrongful intent — an act calculated to deceive.' " (*Exline* vs. *Weldon* (1974), 57 Ill. 2d 105, 110; 311 N.E. 2d 102, 105). We have also observed that "A misrepresentation in order to constitute a fraud must consist of a statement of material fact, false and known to be so by the party making it, made to induce the other party to act, and, in acting, the other party must rely on the truth of the statement." *Roth* vs. *Roth* (1970), 45 Ill. 2d 19, 23; 256 N.E. 2d 838, 840.

The Petitioner, her present husband and the adoptive father all testified unequivocally that there was "agreement" that the child was to be returned to the natural mother. And these witnesses further testify as to conversations with the adoptive mother in which this "agreement" was discussed. The natural mother denies the "agreement" and any and all conversations in which such an "agreement" was discussed.

The Court finds that the credible evidence shows clearly and convincingly, the existence of such representations, and while such an "agreement" is unenforcible and void as against public policy, the existence of such representations is relevant to evidence the intent to operate a fraud upon the Petitioner.

The Court now considers what type of representations and acts constitute fraud. In *Arnold* vs. *Howell et al.* 219 P2d 854 (1950) the allegations were that the maternal grandmother acting in concert with the adopters, represented to the natural parents, that the adoption ". . . was only a temporary measure, the child to be returned . . ." after the father returned from overseas military service. In *Laffoon* vs. *Hayden* 337 P2d 736, the adoptive parties allegedly represented ". . . that they would taken an adoption decree only for convenience of protecting plaintiffs against each other; that the plaintiffs could continue to enjoy the children and treat them as their own . . ." (page 738). In *In Re Adoption of Hoffman* 338 N.E.2d 862, "the natural parents theory of fraud in this case is that the grandparents misrepresented the purpose and necessity for the adoption and led them to conclude that they could retain physical custody of the child notwithstanding the adoption."

In the instant case the Court finds that the efforts to prevail on the mother to first adopt the child out began prior to the birth of the child, and persisted for approximately two and one-half years until the mother finally consented on the consideration that upon her marriage to a man of whom her parents approved, the child would be restored to her. The evidence shows that approximately three (3) weeks after the marriage of the natural mother to her present husband, the Petitioner and her husband sought for the first of many times to obtain the child. They were successively thwarted by the Respondent Adoptive Mother's delaying the return until the Petitioner's economic condition improved, until the present husband had completed his course at Okmulgee Tech, until the child's

school term ended, etc., but throughout this period of request for return of custody by the Petitioner, and the refusal of such request, the Respondent Adoptive Mother never denied the "agreement" nor did she indicate her intention not to honor the same but sought to delay returning the child until some event occurred or condition improved.

The Respondent Adoptive Mother asserts that even if there was fraud practiced upon the Petitioner, she knew or should have known and could have through the exercise of due diligence discovered the fraud in excess of two (2) years before the commencement of the present proceedings. The uncontroverted evidence established that the Petitioner was admitted to the hospital in July, 1974, after an overdose of medication. The Petitioner testified that this occurred immediately following the Respondent Adoptive Mother's refusal to restore custody at the end of the school year, and the revelation by the Respondent Adoptive Mother for the first time that she did not intend to return the child to the natural mother ever. The Respondent Adoptive Mother's pastor and witness testified to his visiting the Petitioner during this overdose episode and that he understood the event to have been the result of a confrontation between the Petitioner and Respondent Adoptive Mother concerning custody of the child.

The Court finds that each delay in returning the child was predicated upon a reassurance by the Respondent Adoptive Mother of the "agreement" to return the child to its natural mother, and that each delay was further predicated on logical and rational bases which would terminate upon the passage of a brief interim. The Court concludes that the Petitioner was not aware and could not have become aware, through the exercise of due diligence, of the fraud practiced upon her until July, 1974.

The Court finds that the Petitioner's unrealized expectations that her natural child would be returned to her,

was a direct result of the misrepresentations of the Respondent Adoptive Mother.

The Oklahoma court in *Graves* vs. *Graves* 481 P2d 136 at page 138 quoted with approval the general rule from *Conville* vs. *Bakke* 400 P2d 179 ". . . that the adoption statute is strictly construed in favor of rights of natural parents when the controversy is between the natural parents and persons seeking to destroy their parental status . . .". It should be noted that *Graves* vs. *Graves* supra was likewise a proceeding to set aside an adoption of a child by the grandparents on the ground of fraud.

The Courts recognize that consideration should be given to the relationship of the parties and the general rule set out in *McGann* v. *McGann* 37 P2d 939 wherein the Court held that "transaction whereby parent gains advantage over immature child or whereby mature child gains advantage over aged and infirm parent will be scrutinized closely by equity court, where transaction is attacked for alleged undue influence." In the instant case, we have a 17-year-old daughter residing in the home, unmarried, totally dependent upon her parents for support, who is subjected to psychological domination of her mother and who finally submits conditionally to the adoption of child after resisting for two and one-half years. When the daughter, three (3) weeks after her marriage, attempted in January or early February, 1972, to regain custody of her child, the adoptive parents finalized the decree shortly thereafter on February 28, 1972.

Graves vs. *Graves* supra held that ". . . the welfare of the child is not to be ignored in considering the validity of the adoption proceedings . . .", and the best interest test was likewise applied by the Court of Appeals in *In the Matter of the Adoption of Morrison, a Minor Child*, 47 OBAJ 1280 (May 25, 1976).

In applying the best interest test, this Court finds that the present adoptive parents are divorced and that custody of the minor child has been placed in the adoptive mother. The Court further finds that there has been difficulty experienced in the adoptive father's exercising his right of reasonable visitation with the minor child. The Court further finds that the natural mother is married, in a stable home which has not been subjected to the trauma of voluntary separations or petition for divorce or separate maintenance, that there has been born of the marriage of the natural mother and her first and only husband, one child, and that another child is expected of the marriage. The Court finds that the natural mother's husband is a Sergeant in the United States Armed Forces and is contemplating a military career. The Court finds that the mother and her present husband enjoy a stable marital relationship. The Court further finds that the minor child is, and has been throughout her life, aware of the natural relationship of the parties.

The Court finds that the uncontroverted evidence is that the adoptive father overheard a conversation in which the minor child expressed the wish that her adoptive mother were dead in order that she, the child, could live with her natural mother and the natural mother's husband. The Court further finds that on an occasion where the natural mother visited at the child's school for a lunch period, that an effort to extend the period of time for visitation was denied by school authorities and that the minor child became very anxious and agitated at the termination of the visit with her natural mother.

The Court further finds that the adoptive mother is 45 years of age and that there are no other children in the home. The Court concludes that when the child reaches her eighteenth birthday in July of 1986, that the adoptive mother will be 55 years of age and the natural mother will be age 35. The Court further finds that the adoptive mother

is maintaining full-time employment and the child is left in the care of an elderly octogenarian grandmother (natural great-grandmother). The Court further finds that the natural mother is a full-time housekeeper and homemaker and resides in an adequate and comfortable home with her husband and child.

The Court therefore finds that the Petitioner has established to the Court's satisfaction by clear and convincing evidence that the instant adoption was procured through fraud, deceit and material misrepresentation, and the Court further finds that the Respondent Adoptive Mother has not shown by a preponderance of the evidence that the Petitioner knew or could have, through the exercise of due diligence, discovered the existence of such fraud, deceit, and material misrepresentation two (2) years antecedent to the filing of this petition.

The Court therefore finds that the amended petition to set aside the Decree of Adoption as amended, should be and the same hereby is granted and sustained.

The Decree of Adoption heretofore entered on the 28th day of February, 1972, is hereby vacated, set aside, and held for naught, and the Petition for Adoption is accordingly dismissed.

To provide for maintenance of stability and order, the effectiveness of the orders herein entered is hereby stayed for a period of fifteen (15) days from this date.

Done on this the 4th day of June, 1976.

s/ Glenn Dale Carter,
Glenn Dale Carter
Associate District Judge

[CERTIFICATE OF TRUE COPY
Dated 18 June, 1976 and signed by
Donna Morris, Deputy.]

APPENDIX F

10 OKLA. STAT. (1971) §58

§ 58. Limitation on challenge to adoption after entry of final decree

No adoption may be challenged on any ground either by a direct or collateral attack more than one (1) year after the entry of the final adoption decree regardless of whether the decree is void or voidable, and the minority of the natural parent shall not operate to prevent this time limit from running.

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12 OKLA. STAT. (1971) §95

§ 95. Limitation of other actions

* * * * * * *

Third. Within two (2) years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contact, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

* * * * * * *

Sixth. An action for relief, not hereinbefore provided for, can only be brought within five (5) years after the cause of action shall have accrued.

12 OKLA. STAT. (1971) §1038

§ 1038. Limitation

Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions four, five and seven, of Section 5267[1] must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or a person of unsound mind and then within two years after removal of such disability. Proceedings for the causes mentioned in subdivisions three and six of the same section, shall be within three years, and in subdivision nine, within one year after the defendant has notice of the judgment. A void judgment may be vacated at any time, on motion of a party, or any person affected thereby. R.L.1910, § 5274.

[1] Section 1031 of this title.